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RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
NO. DIST. OF CA. S.J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAN HELLER

Plaintiff,

COMPLAINT FOR DAMAGES

DEMAND FOR JURY TRIAL

vs.

AOL, LLC and John Does 1-10
Defendants.

CASE NO. **09-00435**

JURISDICTION AND VENUE

HRL

1.

This action arises under the Federal Copyright Act of 1976, as amended, 17 U.S.C. § 101, *et seq.* Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1338(a).

2.

This Court has personal jurisdiction over Defendant AOL, LLC by virtue of its transacting, doing, and soliciting business in this District, and because a substantial part of the relevant events occurred in this district.

3.

Venue is Proper under 28 U.S.C. §§ 1391(b)(2) and (c) and 1400(a).

THE PARTIES TO THIS COMPLAINT

4.

1 Plaintiff Dan Heller (hereinafter "Heller,") is an individual residing in Greenbrae,
2 CA 94904.

3
4 5.

5 Defendant AOL, LLC (hereinafter "AOL,") is a company formed in Delaware with
6 headquarters located at 770 Broadway, New York, New York 10003. AOL is registered as a
7 foreign corporation doing business in California as America Online, Inc., and may be served
8 through its registered agent, Corporation Service Company, at 2730 Gateway Oaks Dr., Suite
9 100, Sacramento, CA 95833.

10 6.

11 On information and belief, AOL owns and operates Weblogs, Inc., and Weblogs,
12 Inc. owns and operates www.joystiq.com, a video gaming blog website.

13 7.

14 Plaintiff does not know the true names of defendants John Does 1 through 10,
15 inclusive, and therefore sues them by those fictitious names. Plaintiff is informed and
16 believes and, on the basis of that information and belief, alleges that each of those
17 defendants was in some manner negligent, grossly negligent, guilty of willful and wanton
18 conduct, and proximately caused Plaintiff's damages.

19 FACTS

20 8.

21 Heller is a professional photographer who specializes in travel and nature
22 photography.

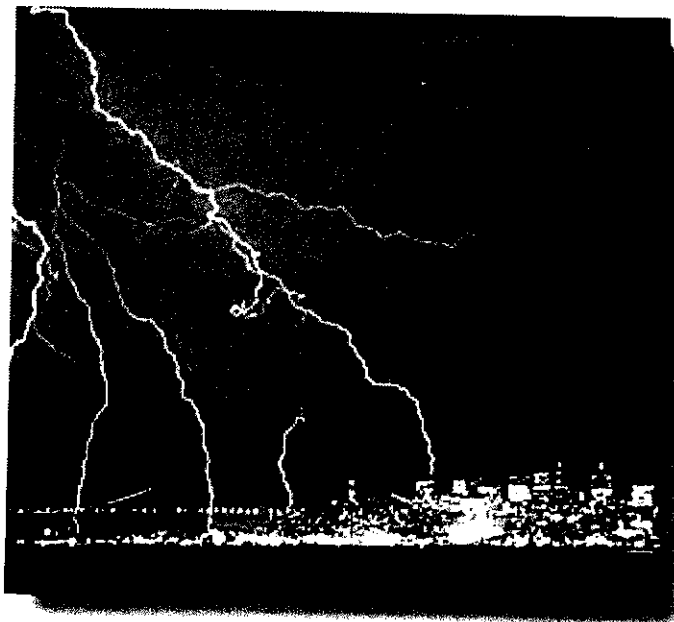
23 9.

24 Heller took several photographs of a lightning storm occurring over the San
25 Francisco, California skyline. Heller is and has always has been the sole proprietor of all
26 rights, title, and interest in and to the copyrights in these San Francisco Lightning Photos.

27 10.

28 Heller posted one (1) of his San Francisco Lightning Photos ("Lightning Photo")
on his website at www.danheller.com. Heller's copyright notice with the copyright

1 symbol and the website address of www.danheller.com ("copyright management
2 information") was posted on and included in the metadata of the Lightning Photo (as
3 shown below):



15 Embedded in the Lightning Photo were "metatags" which would, if retained in
16 digital copies of the Lightning Photo, enable automated internet search utilities to locate
17 unauthorized copies of the Lightning Photo. Heller regularly uses such automated search
18 routines and metatags to locate instances of copyright infringement on the internet.

19
20 11.

21 In 2008, Heller discovered that AOL's website, www.joystiq.com, posted and
22 displayed Heller's Lightning Photo. AOL did not obtain authorization from Heller to
23 publish the Lightning Photo. Heller discovered AOL's unauthorized use of the photo
24 through alternate methods, rather than through his use of automated search utilities, as
25 AOL had removed the metatags and Heller's copyright management information from the
26 photo.

27 12.

28 Heller has complied in all respects with the Copyright Act of 1976, 17 U.S.C.
§101 *et seq.*, as amended, and all other laws and regulations governing copyrights, and has

secured the exclusive rights and privileges in and to the copyright for the Lightning Photo. The Register of Copyrights for the U.S. Copyright Office issued Heller a valid Certificate of Copyright Registration for the Lightning Photo, (Vau-603-395) effective September 14, 2003.

FIRST CAUSE OF ACTION

(Copyright Infringement)

13.

Heller re-alleges and incorporates by reference Paragraphs 1 through 12 above.

14.

Beginning in or about November 2007, AOL copied, reproduced, created a derivative work and/or displayed on its website at www.joystiq.com without authorization Heller's Lightning Photo (the "Infringement") as shown below:



15.

AOL has not compensated Heller for its copying, displaying, creating a derivative work of, and/or publishing the Lightning Photo.

16.

AOL's conduct violates the exclusive rights belonging to Heller as owner of the copyright for the Lightning Photo, including without limitation, Heller's exclusive rights under 17 U.S.C. § 106.

17.

As a direct and proximate result of its wrongful conduct, AOL has realized and continues to realize profits and other benefits rightfully belonging to Heller for the Lightning Photo. Accordingly, Heller seeks an award of actual damages plus attorneys' fees and costs pursuant to 17 U.S.C. §§ 504 and 505.

18.

In the alternative, Heller is entitled to and seeks statutory damages for the Infringement of the Lightning Photo, including attorneys' fees and costs, pursuant to 17 U.S.C. §§ 504 and 505.

19.

The Infringement by AOL was willful and performed with knowledge that the use of the Lightning Photo was unauthorized; Heller is therefore entitled to the recovery of enhanced statutory damages pursuant to 17 U.S.C. 504.

SECOND CAUSE OF ACTION

(Removal of Copyright Management Information)

20.

Heller re-alleges and incorporates by reference Paragraphs 1 through 19 above.

21.

AOL knowingly and with the intent to induce, enable, facilitate or conceal infringement provided and/or distributed copyright management information that is false for Heller's Lightning Photo, in violation of 17 U.S.C. § 1202 (a).

22.

AOL, without the authority of Heller or the law, intentionally removed and/or altered Heller's copyright management information, distributed copyright management information knowing that Heller's copyright management information had been removed or altered without the authority of Heller or the law, and/or distributed Heller's Lightning Photo knowing that Heller's copyright management information had been removed or altered without the authority of Heller or the law, in violation of 17 U.S.C. § 1202 (b).

23.

Heller is entitled to and seeks statutory damages for AOL's removal of the copyright management information from the Lightning Photo, including attorneys' fees and costs, pursuant to 17 U.S.C. § 1203.

WHEREFORE Plaintiff prays for judgment as follows:

1. Declare that AOL's unauthorized conduct violates Heller's rights under common law and the Federal Copyright Act;
2. Order AOL to account to Heller for all gains, profits, and advantages derived by AOL through its infringement of Heller's copyright; or such damages as are proper;
3. Award Heller profits and damages in such amount as may be found pursuant to 17 U.S.C. § 504 (b) for the Infringement of the Lightning Photo; alternatively, award Heller maximum statutory damages in the amount of \$30,000 for each infringement pursuant to 17 U.S.C. § 504 (c)(1); or such other amount as may be proper pursuant to 17 U.S.C. § 504;
4. Award Heller maximum statutory damages in the amount of \$150,000 for each infringement pursuant to 17 U.S.C. § 504 (c)(2) for the Lightning Photo; or such other amount as may be proper pursuant to 17 U.S.C. § 504;
5. Award Heller actual damages in such amount as may be found pursuant to 17 U.S.C. § 1203(c)(2); alternatively, award Heller maximum statutory damages in the amount of \$25,000, pursuant to 17 U.S.C. § 1203(c)(3)(B);

- 1 or such other amounts as may be proper pursuant to 17 U.S.C. § 1203;
- 2 6. Award Heller his costs, reasonable attorneys' fees, and disbursements in
- 3 this action, pursuant to 17 U.S.C. § 505 and 17 U.S.C. § 1203(b)(5); and
- 4 7. For such other and further relief as the Court may deem just and proper.
- 5 Plaintiff demands a jury trial on all of the foregoing counts.
- 6 This 30th day of January, 2009.

7 Respectfully submitted,

8 

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